SUPREME COURT, U. S.

Supreme Court, U.S.
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In The

Supreme Court of the United States

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SAMUEL MANARITE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPREME COURT OF THE UNITED STATES
OCTOBER 1970 TERM

SAMUEL MANARITE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner SAMUEL MANARITE petitions this Court for a writ of certiorari, to review the judgment of the United States Court of Appeals for the Second Circuit, entered November 19, 1970 (Docket No. 35153).

The judgment affirmed the conviction for using extortionate means to collect a usurious loan, in violation of 18 U.S.C. 894, after a jury trial in the Southern District of New York (No. 69 CR 892).

Opinion Below

The opinion of the Court of Appeals, not yet reported, is set forth in its entirety. See also Appendix.

"PER CURIAM:

We have affirmed in open court because we believe appellant's challenge to the constitutionality of one of the statutes under which he was convicted, 18 U.S.C. §894, forbidding 'the use of any extortionate means ...to collect or attempt to collect any extension of credit,' is foreclosed by our recent decisions in United States v. DeStefano, ____ F.2d ____ (1970), and United States v. Perez, 427 F.2d 1073, cert. granted, 39 U.S.L.W. 3212 (1970). Moreover, we did not see any merit to his other contentions."

HAYS, Circuit Judge (concurring):

"Having dissented in U.S. v. Perez, I consider myself bound by the result in that case and therefore concur in the present opinion."

Jurisdiction

The jurisdiction of this Court to review the judgment of the Court of Appeals is granted pursuant to 28 U.S.C. 1254 (1).

Constitutional and Statutory Provisions Involved

18 U.S.C. 894, to the extent applicable, recites:

"(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the non-repayment thereof,

shall be fined not more than $10,000 or imprisoned not more than 20 years, or both."

Article I, Section 8, of the United States Constitution, insofar as relevant, states:

"The Congress shall have power...

* * *

To regulate commerce with foreign nations, and among the several states...."

Issues Involved

Is the extortionate credit transaction statute (18 U.S.C. 894) unconstitutional, or beyond the powers of Congress, pursuant to the interstate commerce clause and the bankruptcy clause? See Perez v. United States, No. 600 October 1970 Term.

Is the same statute unconstitutional, because the Congressional "findings" of interstate commerce impact (4201 of the Oct. — Pl 90-321) adopted in an effort to sustain the statute, a sham, not supported by any evidence to be found in the legislative history, as required by Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) and Katzenback v. McClung, 379 U.S. 294 (1964)?

Preliminary Statement

Petitioner SAMUEL MANARITE was convicted on a one-count indictment of using "express and implicit threats of violence and other criminal means to cause harm to the person, reputation and property of the debtor, Phil Frimet, in order to collect and attempt to collect an extension of credit, from the said Phil Frimet," in violation of 18 U.S.C. 894, during the period from April 1, 1969 to October 1, 1969 (language of the indictment).

Co-defendant RICHARD PORTELA was acquitted by the jury.

Both the District Court and the Court of Appeals rejected the defense contention that the underlying statute was unconstitutional. Both courts felt constrained by the earlier decision of the Court of Appeals in United States v. Perez, 426 Fed. 1073 (CA-2, 1970), sustaining the constitutionality of the statute against an attack that it was invalid, and beyond the powers of Congress, because it required neither the pleading nor proof of interstate commerce activity.

Briefly, the evidence established that Manarite lent Frimet $3,000 in the spring of 1969 at an interest rate of $150 per week — somewhat in excess of the legal lending rate. When Frimet got behind in his repayment schedule, Manarite pressed him for money — and spoke inappropriately harshly to him. Subsequently, Frimet reported the transactions to the FBI. On September 30th and October 1st, armed with a tape recorder supplied by the FBI, Frimet recorded two telephone conversations had with Manarite. The two

tapes, and the transcripts of the two tapes, formed the bulk of the government's case.

Reasons for Granting the Writ

I.

On November 16th, this Court granted certiorari in Perez v. United States, No. 600 October 1970 Term, and agreed to review the constitutionality of the extortionate credit transaction statute (the loan shark amendment) — 18 U.S.C. 894, 39 U.S. Law Week 3214.

It was on the strength of Perez (426 F.2d 1073) that the Court of Appeals had affirmed the conviction.

This case presents the identical issue — did Congress exceed its powers, under the interstate commerce clause, and under the bankruptcy clause, in prohibiting and penalizing extortionate credit transactions, without requiring the prosecution in a criminal case to plead and prove some interstate commerce activity.

The Court will recall that Circuit Judge Hays had dissented in the Court of Appeals in Perez on this very issue. 426 F.2d at 1081.

Furthermore, Manarite's counsel had advanced a contention in the Court of Appeals not raised in Perez — that there was no adequate evidence before Congress to show a connection between interstate commerce and loan sharking, as required by Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) and Katzenbach v. McClung, 379 U.S. 294 (1964).

In Heart of Atlanta Motel Inc. v. United States, 379 U.S. 294 (1964), in upholding the public accommodations provisions of the Civil Rights Act of 1964, the Supreme Court reiterated the well established rule that the Congressional exercise of power under the interstate commerce clause is dependent upon a finding that the activity sought to be regulated concerns "more states than one." 379 U.S. at 255. Nor does it suffice that the effect on interstate commerce is remote, speculative, or merely possible — there must be evidence of reality. 379 U.S. at 275 (concurring opinion — Black, J.). Nor is it significant that Congress has made a finding which in fact is not supported by the legislative record — "the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this court." 379 U.S. at 303. It is the legislative history — the record, hearings, testimony, reports and debate — which must be the basis of congressional action. 379 U.S. 246, 250, 252, 299. In Heart of Atlanta Motel, the court found that the motel owners solicited out-of-state business, and in fact 75% of its registered guests were from out of state. 379 U.S. at 243. In Ollie McClung, the court found that a substantial portion of the food served in the restaurant had moved in interstate commerce. 379 U.S. at 296-297.

II.

While Congress wrote into Section 201 of Title II of the Consumer Credit Protection Act, Public Law 90-321, 82 Stat. 146, as a preamble to Title 18 U.S.C. Sec. 891-896, "findings" of impact upon interstate commerce and disruption of the

workings of the Bankruptcy Law by the use of extortion in the collection of credit, a total reading of the legislative history does not reveal one shred of evidence to support such "findings." It is submitted that a declaration of such "findings" is a sham, and shows Congress was obviously troubled by the lack of legitimacy for their actions. Mere lip service to the tenet of federalism and constitutional limitations is not an adequate substitute for the requirements of an adequate factual and legal basis.

Committee hearings were held by the Senate Banking Committee during April, May and June of 1967 on Senate Bill No. 5 (S.5). The bill was reported favorably to the Senate on June 28, 1967. It was passed by the Senate on July 11, 1967, and referred to the House Banking Committee the next day. 1968 U.S. Code Congressional and Administrative News, pp. 1962, 1964 (subsequently referred to Cong. News).

The House Banking Committee conducted hearings on House Bill No. 11601 (H.R. 11601) during August 1967. The Committee reported the bill favorably to the House on November 28, 1967. Cong. News at 1964.

House Report No. 1040 (12/31/67) makes no mention whatsoever of what subsequently became the extortion or loan shark amendment. The bill at this stage had only three titles, and did not include what eventually became Title II. Nor does the extensive report refer to any evidence or testimony of extortion in the collection of credit, or its impact upon commerce. See pages 1962-2021, Cong. News.

In Heart of Atlanta Motel Inc. v. United States, 379 U.S. 294 (1964), in upholding the public accommodations provisions of the Civil Rights Act of 1964, the Supreme Court reiterated the well established rule that the Congressional exercise of power under the interstate commerce clause is dependent upon a finding that the activity sought to be regulated concerns "more states than one." 379 U.S. at 255. Nor does it suffice that the effect on interstate commerce is remote, speculative, or merely possible — there must be evidence of reality. 379 U.S. at 275 (concurring opinion — Black, J.). Nor is it significant that Congress has made a finding which in fact is not supported by the legislative record — "the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this court." 379 U.S. at 303. It is the legislative history — the record, hearings, testimony, reports and debate — which must be the basis of congressional action. 379 U.S. 246, 250, 252, 299. In Heart of Atlanta Motel, the court found that the motel owners solicited out-of-state business, and in fact 75% of its registered guests were from out of state. 379 U.S. at 243. In Ollie McClung, the court found that a substantial portion of the food served in the restaurant had moved in interstate commerce. 379 U.S. at 296-297.

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The bill was first brought up for debate on January 30, 1968 in the House. As of that date there still was no mention of extortion in credit transactions. See Congressional Record, Vol. 114, pp. 1421-1460 (subsequently referred to as Cong. Rec.). On the next day, during the debates (Cong. Rec. 1582-1618), Congressman Richard H. Poff (Va.) introduced the loan shark amendment, which included the "findings" of impact upon interstate commerce at 1605-1609. The amendment was adopted at 1610.

Subsequently, on May 20, 1968, Senate-House conference approved the Senate Bill (S.5) which was passed in lieu of the House Bill after substituting for its language much of the text of the House Bill. Cong. News at 1962. See Conference Report No. 1397, Cong. News 2021-2030. Title II on extortion was inserted in the House amendment to S.5 at 2025. In the Conference Report discussion on Title II, no reference was made at all to hearings, testimony or Congressional findings. See pp. 2025-2029. The Report does refer to the purported basis of the constitutional power as the bankruptcy clause. See p. 2025.

Two days later both the House and the Senate passed the bill, as amended. See Vol. 114, Cong. Rec., pp. 14375-14398, 14486-14493. Again the debates reveal no evidence with respect to extortion. It should be noted that the loan sharking provision which was finally adopted differed from the original Poff amendment. See p. 14388.

As such the legislative history fails to satisfy the standards of Heart of Atlanta Motel, 380 U.S. 241 and Ollie McClung, 379 U.S. 294 that Con-

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gressional action be supported by evidens and de-
found in the hearings, testimony, reports
bate.

amend-
While the "findings" of the loan shark te com-
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merce and disruption of bankruptcies (Sfers only
the House-Senate Conference Report ref5. Either
to the bankruptcy power. Cong. News 2025telling to
the draftsmen of the statute were not telse they
the authors of the Conference Report, or ommerce
had abandoned their reliance upon the co
power.

mine the
There were no hearings held to deterommerce
effect of loan sharking upon interstate coThe Con-
— there was no testimony of any kind. Trence to
gressional Record merely reflects a refeng. Rec.
a couple of newspaper articles — 114 Co H. 1053
H. 502-506 (1/30/68); 114 Cong. Rec. 22, 4125
(2/15/68); 114 Cong. Rec. H. 4120-2, 41-
(5/22/68); and 114 Cong. Rec. S.6116, 18 (5/22/
68). This is not the type of legisla ve history
contemplated by the High Court, 379 .S. at 246,
250, 252, 299.

It is in order for this Court to revie the ques-
tion of whether Congress, in order to e act a sta-
tute pursuant to its interstate commer e powers,
may adopt "findings" as to interstate commerce
impact, when in fact there was no suc evidence
before Congress to consider.

Conclusion

It is requested that the petition be granted, and the matter set down for argument along with Perez. The constitutional challenge as to the Congressional "findings," which has been raised by Manarite and not by Perez, warrant a joint argument for full consideration as to the propriety of the statute.

Respectfully submitted,

H. ELLIOT WALES
Counsel for Petitioner Manarite
299 Broadway
New York, N.Y. 10007

December 14, 1970.

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 331 — September Term, 1970

(Argued November 19, 1970 Decided November 19, 1970.)

Docket No. 35153

UNITED STATES OF AMERICA,

Appellee,

-v.-

SAMUEL F. MANARITE,

Appellant.

Before:

KAUFMAN, HAYS, and GIBBONS,*
Circuit Judges.

Appeal from conviction after trial before a jury, Palmieri, J., for using extortionate means to collect or attempt to collect an extension of credit in violation of 18 U.S.C. §§894 and 2.

---

*Of the United States Court of Appeals for the Third Circuit, sitting by designation.

Opinion

H. ELLIOT WALES, New York, N.Y., for appellant.

STEPHEN H. SCOTT, Special Attorney, United States Department of Justice (Jack Kaplan, Asst. United States Attorney, of counsel;

Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, on the brief), for appellee.

PER CURIAM:

We have affirmed in open court because we believe appellant's challenge to the constitutionality of one of the statutes under which he was convicted, 18 U.S.C. §894, forbidding "the use of any extortionate means...to collect or attempt to collect any extension of credit," is foreclosed by our recent decisions in United States v. De Stefano, ____ F.2d ____ (1970), and United States v. Perez, 427 F.2d 1073, cert. granted, 39 U.S.L.W. 3212 (1970). Moreover, we did not see any merit to his other contentions.

HAYS, Circuit Judge (concurring):

Having dissented in U. S. v. Perez, I consider myself bound by the result in that case and therefore concur in the present opinion.